85-1663

Supreme Court, U.S.
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NO. 85-_____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

ALVIN TOLLIVER,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

WHETHER THE PETITIONER HAD STANDING TO CONTEST THE SEARCH OF HIS WIFE'S AUTOMOBILE BEING DRIVEN BY A THIRD PARTY UNDER *RAKAS V. ILLINOIS*, 448 U.S. 98 (1978).

WHETHER THERE WAS SUFFICIENT PROBABLE CAUSE UNDER THE FOURTH AMENDMENT FOR THE ARREST OF PETITIONER.

WHETHER THE GOVERNMENT DENIED PETITIONER'S RIGHT TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT WHEN IT USED SIX OF ITS EIGHT PEREMPTORY STRIKES TO STRIKE SIX BLACK OR HISPANIC VENIREMEN FROM THE JURY PANEL WHEN ALL OF THE FIVE DEFENDANTS WERE EITHER BLACK OR HISPANIC.

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v.

UNITED STATES OF AMERICA,
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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner, ALVIN TOLLIVER, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit in case No. 85-1183 has been published but not yet reported in the Federal Reporter as of this date, but is attached and labeled Appendix A. The Court of Appeals issued an unpublished opinion upon denial of Rehearing and Suggestion of Rehearing En Banc and a copy of such unpublished opinion is attached as Appendix B.

JURISDICTION

Jurisdiction of this Court is invoked under 28 U.S.C. Sec. 1254(1). The opinion of the Court of Appeals for the Fifth Circuit was rendered on January 16, 1986. Rehearing was denied on March 11, 1986.

CONSTITUTIONAL PROVISIONS INVOLVED

1. This case involves the Fourth Amendment to the United States Constitution which states:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

2. This case also involves the Sixth Amendment to the United States Constitution which states:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

STATEMENT OF THE CASE

The Petitioner was charged with a two count indictment with the offenses of conspiracy with intent to dis-

tribute a controlled substance and possession with intent to distribute a controlled substance. Also indicted as Co-Defendants were Jose Antonio Perrett-Guerra, also known as Juan, Amalio Galvan-Venegas, Willie Ernest Scott and Angela Faye Onick. Upon a joint trial, all Defendants were convicted on both counts of the indictment. All Defendants appealed their convictions to the United States Court of Appeals for the Fifth Circuit and on January 16, 1986 the Fifth Circuit reversed the convictions of Willie Ernest Scott and Angela Faye Onick due to the reason that the evidence was insufficient to sustain their convictions on either count.

The Court of Appeals for the Fifth Circuit affirmed the convictions of Alvin Tolliver, Jose Antonio Perrett-Guerra and Amalio Galvan-Venegas.

Petitioner's trial took place on February 4, 1985 in the United States District Court for the Northern District of Texas.

VIOLATION OF THE FOURTH AMENDMENT

Prior to trial on the merits, all Defendants filed Motions to Suppress certain physical evidence alleging, *inter alia*, that the government lacked probable cause for the arrest and subsequent search of the Defendants' person and certain automobiles. After a pre-trial hearing, the trial court denied all Motions to Suppress.

Agent Tom Waddill testified during the hearing on the Motion to Suppress that he first became aware of Alvin Tolliver during April, 1981. He learned of Mr. Tolliver's name after Tolliver took over the management of a night-club from one Titus Bloodworth after Bloodworth's

arrest. Further, Waddill received information that Tolliver was dealing large amounts of heroin and cocaine. Further, during an investigation into one Donnie Harper, Agent Waddill learned that Mr. Tolliver used a Page-A-Phone beeper number 5107.

Agent Waddill began to receive records for telephone messages left for beeper number 5107 in 1982. Agent Waddill continued to monitor the messages left for Tolliver on beeper number 5107 from 1982 and 1983. In addition, Mr. Waddill saw Mr. Tolliver in attendance at court trials for individuals charged with drug-related offenses. Waddill further had heard that Tolliver may have arranged for bond money for some individuals charged with drug offenses, but did not know who they were.

In September, 1982 Agent Waddill first saw the name "Juan" with a call back number to the Caravan Motel on Tolliver's Page-A-Phone messages. Jose Antonio Perrett was registered to the room number left in the telephone message. After that time, Waddill obtained a report that a Jose Antonio Perrett had a prior drug arrest in Houston, Texas.

In 1982 Agent Waddill became aware of a report that of six submitted undercover buys of heroin, three proved to be of Mexican origin. Of these six submitted purchases, three occurred in January, 1982, two in March, 1982, and one in April, 1982. The record is silent as to whom the three Mexican heroin purchases were purchased from and when they were purchased.

In January, 1983 Agent Waddill saw Alvin Tolliver in the company of Amalio Galvan at the Caravan Motel.

At 1:25 p.m. on September 12, 1983 Agent Waddill received information that "Juan" had contacted Alvin Tolliver by leaving a message on beeper number 5107. The extent of the information received was that "Juan" had left the telephone number and room number 109 of the Caravan Motel.

Agent Waddill, as a result of this communication, went to the Caravan Motel along with other police officers. At 1:55 p.m. Waddill arrived at the Caravan Motel and set up surveillance on room 109. After a few minutes, Amalio Galvan exited room 109, got in a vehicle and exited the motel area. He was not followed. A few minutes later, Alvin Tolliver walked across the parking lot of the motel carrying a brown leather bag that appeared to be full. He knocked on the door of room 109 and was admitted. Another vehicle driven by Ms. Onick drove in front of room 109 and parked. A black male later identified as Willie Ernest Scott walked across the parking lot and got into the automobile driven by Ms. Onick. Officer Rose Romero walked from the surveillance room by the vehicle, got the license plate number, but did not recognize either Scott or Onick. The automobile registered to Barbara Carr, common-law wife of Petitioner Tolliver.

Mr. Tolliver exited room 109 and placed the brown leather bag in the automobile driven by Onick.

After a short conversation with Ms. Onick, Mr. Tolliver returned to room 109, and Ms. Onick and Mr. Scott left the scene in the automobile. Ms. Onick was the driver and a short distance from the motel she parked in a parking lot whereupon both she and Mr. Scott were ordered from the vehicle at gunpoint. There had

been no traffic offense observed. Agent Waddill immediately opened the brown leather bag and found it to be empty. There was a brown purse found on the console of the vehicle and it contained several hundred dollars and a white powdery substance. There was a black gummy substance wrapped in cellophane found in the front driver's seat.

After the arrest of Onick and Scott, Officer Waddill returned to the Caravan Motel and, along with other officers, resumed surveillance on room 109.

Amalio Galvan returned to the motel and entered room 109. Tolliver, Perrett and Galvan then exited room 109 and went to the vehicle previously driven by Galvan. The officers left their surveillance room, drew their weapons and ordered all three from the vehicle. There was another officer in the area in a vehicle and he had been advised to block the exit to the motel to prevent the three from leaving.

As Alvin Tolliver was placed over the vehicle, he made a move to his right ankle. He was searched and his right ankle was found to have heroin inside his sock. Perrett and Galvan were also searched and found to have approximately $19,000.00 each on their persons.

VIOLATION OF THE SIXTH AMENDMENT

After the jury was impaneled counsel for Petitioner Tolliver objected to the improper use of peremptory challenges by the government. The record reflects that of the government's eight challenges, the government exercised six of those on blacks and hispanics. Further, all of the defendants were either black or hispanic.

HOW THE CONSTITUTIONAL ISSUES WERE RAISED AND DECIDED BELOW

As was stated previously, prior to trial, Petitioner filed a Motion to Suppress Physical Evidence asking the trial Court to suppress the evidence obtained as a result of the search of the car occupied by Co-Defendants Scott and Onick. Further, the motion asked the trial Court to suppress evidence seized as a result of the search of Petitioner's person as he was arrested. The trial Court overruled Petitioner's contentions.

In the Court of Appeals for the Fifth Circuit, Petitioner complained that his arrest was not supported by adequate probable cause and the fruits of the search incident to his arrest should be suppressed.

The Court of Appeals held that Petitioner had no standing to complain of the search of the car driven by Angela Faye Onick and that therefore, even if that search of the automobile was not supported by probable cause, nevertheless, the fruits of that search could be used to buttress the probable cause and subsequent arrest of the Petitioner. (see *Tolliver,* et al Appendix A pg. 2797). The record reflects that the automobile in question was registered to Barbara Carr, common-law wife of the Petitioner and the Court of Appeals so noted in its opinion. (see *Tolliver,* et al Appendix A pg. 2789). The Court of Appeals never addressed the issue of the legality of the search of the automobile driven by Angela Faye Onick, but specifically declined to decide that issue since it found the evidence insufficient to justify a conviction as to either the driver or its passenger, Willie Ernest Scott. (see *Tolliver,* et al Appendix A pg. 2792).

Petitioner raised the issue on Motion For Rehearing that the government had waived standing by never raising the issue until appeal, and further that Tolliver had a reasonable expectation of privacy in his wife's automobile. Petitioner's position was not addressed by the Court on denial of the Motion For Rehearing.

Further, the Court of Appeals for the Fifth Circuit held that Petitioner had failed to show a systematic use of peremptory challenges against minorities over a period of time and therefore had failed to show a Sixth Amendment violation of a right to an impartial jury. It is undisputed that all Defendants were either black or hispanic and that of the government's eight allotted challenges, the government utilized six of the eight on either black or hispanic members of the venire. Further, it is undisputed that the Defendants were tried by an all white jury. (see *Tolliver,* et al Appendix A pg. 2791).

JURISDICTION OF THE COURTS BELOW

The jurisdiction of the United States District Court for the Northern District of Texas was invoked by alleging violations of 21 U.S.C. Sec. 846, 21 U.S.C. 841(a) and 18 U.S.C. 2.

The jurisdiction of the Court of Appeals for the Fifth Circuit was invoked as a direct appeal in a criminal case pursuant to Rule 4 of the Federal Rules of Appellate Procedure and 28 U.S.C. Sec. 1291.

REASONS FOR GRANTING THE WRIT

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE PETITIONER HAD STANDING TO CONTEST THE SEARCH OF HIS WIFE'S AUTOMOBILE BEING DRIVEN BY A THIRD PARTY UNDER *RAKAS v. ILLINOIS*, 448 U.S. 98 (1978).

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THERE WAS SUFFICIENT PROBABLE CAUSE UNDER THE FOURTH AMENDMENT FOR THE ARREST OF PETITIONER.

THE COURT SHOULD GRANT CERTIORARI TO CONSIDER WHETHER THE GOVERNMENT DENIED PETITIONER'S RIGHT TO A FAIR TRIAL UNDER THE SIXTH AMENDMENT WHEN IT USED SIX OF ITS EIGHT PEREMPTORY STRIKES TO STRIKE SIX BLACK OR HISPANIC VENIREMEN FROM THE JURY PANEL WHEN ALL OF THE FIVE DEFENDANTS WERE EITHER BLACK OR HISPANIC.

The Petitioner respectfully submits that the opinion of the Court of Appeals for the Fifth Circuit of January 16, 1986 is incorrect as it applied the issue of standing to Alvin Tolliver.

The opinion lumps the Petitioner with Co-Defendants Perrett-Guerra and Galvan-Venegas and holds that all three had no standing to contest the issue of the earlier search of the automobile driven and occupied by the other two Co-Defendants. Concededly, Perrett-Guerra and Galvan-Venegas do not have standing to contest the search of the automobile. However, the opinion does not dif-

ferentiate Petitioner's position and expectation of privacy in the vehicle due to the fact that the vehicle was owned by his common-law wife.

Secondly, the government made no issue of standing in the trial court and never questioned Petitioner's standing to question the search of the vehicle until the appellate process.

It is therefore submitted that the government, by raising the lack of standing for the first time on appeal, has waived the issue of standing. See *United States v. Sanchez,* 689 F.2d 508 (5th Cir., 1982).

However, Petitioner does have standing to contest the search of the vehicle as well as the search of his person. In *Rakas v. Illinois,* 448 U.S. 98 (1978) a person must have a "reasonable expectation of privacy" in the place searched in order to have standing to contest the legality of the search.

It is reasonable to hold that a husband has a reasonable expectation of privacy in the automobile owned by his wife. Such being the case, the evidence obtained in the search of the vehicle in question may not be used to further buttress probable cause for the arrest of the Petitioner under *Wong Sun v. United States,* 317 U.S. 471 (1962).

When the foregoing is considered, the agents herein never had any information that a drug transaction was to take place that day either between the parties involved, or at the place of arrest.

The essence of Tolliver's challenge to his arrest and subsequent search of his person is that the arrest and

search was without the required level of probable cause and therefore violated the Fourth Amendment of the United States Constitution. The Fourth Amendment generally requires a warrant based upon adequate probable cause as a condition precedent to an arrest and search. *South Dakota v. Opperman,* 428 U.S. 364 (1976); *Agnello v. United States,* 269 U.S. 20 (1925). The Constitution requires the "deliberate, impartial judgment of a judicial officer," *Opperman, supra,* rather than a decision "by the officer engaged in the often competitive enterprise of ferreting out crime." *Johnson v. United States,* 333 U.S. 10 (1948). The actions of the law enforcement personnel does not rise to the level of sufficiency such as to satisfy Fourth Amendment requirements on search and seizures and, hence, is illegal.

As a preparatory point, it needs to be stated that searches and arrests without prior judicial approval are unreasonable as a matter of law unless the search falls within a recognized exception. *Coolidge v. New Hampshire,* 403 U.S. 443 (1971).

Further, this Court's pronouncement in *Illinois v. Gates,* ____U.S.____, 103 S. Ct. 2317, 76 L.Ed. 527 (1983) needs to be considered.

In *Illinois v. Gates, supra,* the "two pronged" test of *Aguilar v. Texas,* 378 U.S. 108 (1964) and *Spinelli v. United States,* 393 U.S. 410 (1969) was dicarded for the "totality of the circumstances" approach which was intended to be less rigid and a more flexible approach. The determination of probable cause is applicable to

both warrant and warrantless searches. *Draper v. United States,* 358 U.S. 307 (1959).

In *Gates,* the police received a specific tip that the Gates' were selling drugs. The tip was further specified as to how the Gates' would receive the drugs in Florida and transport them to Illinois. Even though the tip was anonymous the police verified much of the tip through observation and corroboration.

Here, we are dealing with a situation wherein Officer Waddill received a tip about Mr. Tolliver in 1982 and sporadically over the next year. However, from the record, it is clear that the "tip" did not meet the requirements of *Aguilar* and *Spinelli.* However, this is not fatal under *Gates* if the information still satisfies the "totality of the circumstances" test.

Agent Waddill did not have a specific tip that a drug transaction was to take place that day between the various Defendants. He had never received *any* information that Perrett or Galvan had ever brought drugs to Mr. Tolliver or anyone else. He had *no* information from any source that Mr. Tolliver had ever received any drugs from Perrett or Galvan or "Juan." He had *no* information from any source that Mr. Tolliver had ever received any drugs at the Caravan Motel. Although Officer Waddill had been monitoring Mr. Tolliver's beeper messages, the name "Juan" never appears on the telephone message from the beeper company until September, 1982 and the purchases submitted for signature analysis that were shown to be of Mexican origin were purchased in the months of January, March and April, 1982. Therefore, although monitoring the telephone messages during those

months, no messages were taken during those months from "Juan".

There was no *specific* tip as to a *specific* transaction that was to occur at the Caravan Motel in the case at bar. There were no evasive actions taken by any of the participants. In fact, all of the actions by all of the participants were entirely consistent with innocent activity as with a drug transaction. So, what the officer had was non-detailed, stale information, that did not satisfy any probable cause requirement, that was corroborated by apparently innocent activity along with no information whatsoever that any transaction was to occur.

The Courts have never gone this far as to justify the resultant arrests that were made on the basis of the state of this record. To do so, would be to totally relax the Fourth Amendment to the extent that virtually any information and/or activity will justify an arrest.

The arrest of Appellant Tolliver was totally lacking in probable cause and, therefore, the fruits of that arrest should have been suppressed.

The Court of Appeals for the Fifth Circuit, resolved the Sixth Amendment Constitutional issue raised by Petitioner by relying upon *Swain v. Alabama,* 380 U.S. 202 (1965). The Court, in its opinion, relied upon the absence of a trial record which demonstrated routine or systematic exclusion of blacks from the petit jury, *Tolliver, et al,* Appendix A, pg. 2791. All of the cases cited in the Court's opinion, *i.e., Swain v. Alabama, supra, Prejean v. Blackburn,* 743 F.2d 1091 (5th Cir. 1984), *modified,* 765 F.2d 482 (5th Cir. 1985), and *Batson v. Kentucky, cert. granted,* 105 S. Ct. 2111 (1985) (No. 84-6263) are State court cases in which the question

presented with respect to discriminatory use of peremptory challenges against minority veniremen are complaints made in the federal system of actions taken in State courts.

The issue before this Court has to do with Sixth Amendment violations as opposed to Fourteenth Amendment violations, and, more importantly, are claims based upon the denial of federally-protected constitutional rights in the Federal Court system. Regardless of the manner in which this Court resolves *Batson v. Kentucky, supra,* the question of fundamental fairness in the Federal Courts can only be decided in the Federal Courts. While *Swain v. Alabama, supra,* creates an almost insurmountable burden for any Defendant to overcome in order to establish a ground for relief, the time has now come for the Federal Courts to lead, by example, with respect to removing this vestige of discrimination and troublesome practice as having no place in a system that guarantees fundamental fairness to all persons.

Therefore, the reliance upon *Swain* and *Prejean* is misplaced. Whatever the standard with respect to securing Federal Court protection from State Court discrimination, *Swain* and *Prejean* have never been read to provide the means by which a United States Attorney, or any of his assistants, could engage in purposeful racial discrimination in the exclusion from jury service of otherwise qualified groups of individuals. As Circuit Judge Williams said in *U.S. v. Leslie,* 759 F.2d 366 (5th Cir. 1985) (rev'd en banc) February 20, 1986; 38 Cr. L. 2465, ". . . racial discrimination . . . in the exclusion from jury service of otherwise qualified groups . . . is at war with our basic concepts of a Democratic society and a representative government." *Smith v. Texas,* 311 U.S. 128, 130 (1940).

Although the historical roots of the peremptory challenge in the American system of justice run deep, peremptory challenges are not commanded by the Constitution. *McCray v. New York,* 361 U.S. 961 (1984); *Rosales-Lopez v. United States,* 451 U.S. 182, 188 n.6 (1981); and *Swain v. Alabama,* 380 U.S. 202, 219 (1965). This Court has the authority, under its supervisory power, over the lower Federal Courts and Federal prosecutors to ensure that peremptory challenges are not used to practice invidious racial discrimination. Racial discrimination which results in the exclusion of jury service of otherwise qualified groups ". . . is at war with our basic concepts of the democratic society and a representative government." *Smith v. Texas,* 311 U.S. 128, 130 (1940).

A Federal prosecutors precious, though not absolute, right to employ peremptory challenges without review must yield in those cases where the Defendant can establish that the prosecutor misused those challenges and engaged in invidious racial discrimination. *U.S. v. Leslie,* 759 F.2d 366 (5th Cir. 1985) *rev'd* (en banc) No. 83-3719, 2/20/86; *McNabb v. United States,* 318 U.S. 332 (1943).

In *McCray v. Abrams,* 750 F.2d 1113 (2nd Cir. 1984), the United States Court of Appeals for the Second Circuit addressed the question of the impermissible use of peremptory challenges to discriminate against "cognizable groups" as violative of the Sixth Amendment to the United States Constitution. Although *McCray* applies to federal habeas corpus relief to State court prisoners, it raises the question of the wisdom of *Swain v.*

Alabama, supra, which was decided on equal protection grounds under the Fourteenth Amendment, as opposed to the Sixth Amendment right to a jury drawn from a fair cross section of the community as established by the United States Supreme Court in *Taylor v. Louisiana,* 419 U.S. 522 (1975).

It can no longer be argued that a United States Attorney has a free and unfettered right to exercise peremptory challenges against cognizable minority groups without that use being called into question by Federal Courts upon proper objection. *United States v. Leslie, supra; McNabb v. United States, supra; Taylor v. Louisiana, supra;* and *Thield v. Southern Pacific Company,* 328 U.S. 217 (1946).

It is clear from the present trend of cases that the time-honored use of peremptory challenges must give way to constitutional attack when complaint is made that the peremptory challenges are being used in an unconstitutional manner. The Eighth Circuit Court of Appeals, in *United States v. Jackson,* 696 F.2d 578, 593 (8th Cir. 1982); and *United States v. Nelson,* 529 F.2d 40, 43 (8th Cir. 1976), exercised its supervisory power over federal prosecutors to prevent racial discrimination by the use of a peremptory challenge. The Second Circuit Court of Appeals has ruled, in *United States v. Newman,* 549 F.2d 240 (1977), that such practice should be barred in federal prosecutions and has extended the same rationale to State proceedings in *McCray v. Abrams, supra.*

In applying the developing case law to the appeal before this Court, it is clear that a *prima facie* case has been made. The United States Attorney should be required to explain the use of the peremptory challenges to eliminate six minority individuals from the jury which

tried this case. Complaint is not made that the prosecutor considered race as one of the factors affecting his decision to exercise his peremptory challenges, but rather that no articulable reason was presented when he was given two opportunities to explain the use of the peremptory challenges. It was stipulated that the Petitioner was tried before an all-white jury. It was stipulated that the prosecutor exercised six of his court-awarded eight peremptory challenges to strike all the minorities which were available to serve on the jury in this case. The District Court should have exercised its supervisory authority over the United States Attorney to determine whether he had considered the veniremen's race in using his peremptory challenges and whether he was justified in doing so.

Further, the complained-of manner in which the peremptory challenges were used violated the Petitioner's constitutional rights. A Defendant's Sixth Amendment right to a jury drawn from a fair cross section of the community would be meaningless if limited to the jury pool and not enforced under circumstances where peremptory challenges are used to deny that very cross-section. This Court, in *Taylor v. Louisiana, supra,* makes it clear that the Sixth Amendment right to a jury trial includes the notion that that jury should be representative of the community. The Sixth Amendment prohibits the prosecution's use of challenges to discriminate on the basis of race. *McCray v. Abrams, supra.*

Thus, it is clear that this case should be remanded to the District Court in order that a hearing be held to determine whether the prosecutor's excuse of a minority venireman was justified based upon factors unrelated to race, or whether race was a valid and justifiable consideration.

CONCLUSION

Petitioner prays that the Petition for Certiorari be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that the above and foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit has been served on this the 9th day of April, 1986, by delivery of a true copy of said instrument by Certified Mail, Return Receipt Requested, in an official depository under the care and custody of the United States Postal Service, enclosed in a wrapper properly addressed to the following:

The Honorable Terence J. Hart
Assistant United States Attorney
310 U.S. Courthouse
10th and Lamar
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The Honorable Solicitor General
Department of Justice
Washington, D.C. 20530
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RETURN RECEIPT REQUESTED

CRAIG A. WASHINGTON

APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1183

OPINION

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALVIN TOLLIVER, JOSE ANTONIO PERRETT, AMALIO GALVAN-VENEGAS, WILLIE ERNEST SCOTT and ANGELA FAYE ONICK,
Defendants-Appellants.

Filed January 16, 1986

Before: Thomas M. Reavley, Jerre S. Williams, and Patrick E. Higginbotham, Circuit Judges.

Opinion by Judge Patrick E. Higginbotham
Appeal from the United States District Court
for the Northern District of Texas

David O. Belew, Jr., District Judge, Presiding

SUMMARY

Criminal Procedure

Appeal from convictions for conspiracy to possess heroin with intent to distribute, possession of heroin with intent to distribute and aiding and abetting. Affirmed in part and reversed in part.

Five defendants were arrested at a motel following an investigation by the Drug Enforcement Administration. All five were convicted.

[1] The defendants, all of whom are either black or hispanic, moved to quash the jury because the government used six of eight peremptory challenges to remove all black and hispanic veniremen, resulting in an all white jury. [2] In order to establish a valid constitutional claim of invidious racial discrimination by a prosecutor in the selection of jurors, the defendant must show the prosecutor's systematic use of peremptory challenges over a period of time. Here, the motion to quash the jury was properly denied.

[3] Because there was not sufficient evidence at trial to sustain the convictions of two of the defendants, Onick and Scott, on either count of the indictment, the Court need not reach the issue of whether there was probable cause for their arrests. [4] To support a conviction for conspiracy to possess heroin with intent to distribute the government must prove the existence of an agreement between two or more persons to violate the narcotics laws and that each conspirator knew of, intended to join, and participated in the conspiracy. [5] Viewing the record in the light most favorable to the government, the evidence is insufficient to support a conspiracy charge against Scott or Onick, as most of the evidence did no more than place them at the motel, where they briefly associated with the other defendants. [6] In the absence of additional evidence providing a link between the other defendants' illegal activities and Scott and Onick, a reasonable jury would have entertained a reasonable doubt as to whether they were guilty of conspiracy. [7] To sustain a conviction for possession of heroin with intent

to distribute the government must show knowing possession of heroin with intent to distribute it. [8] To support a conviction of aiding and abetting it must be shown that the defendants aided and abetted the possession and the intent to distribute. [9] The government's theory for charging Scott and Onick with possession of the heroin held by the other three defendants is the application of the principle of *Pinkerton v. United States*, 328 U.S. 640 (1946), that a party to a conspiracy may be responsible for an offense committed by a coconspirator. Because the conspiracy count failed, *Pinkerton* cannot apply to find them guilty of a substantive offense based on the heroin found on another defendant. [10] A similar conclusion must be reached as to the charges against Scott and Onick for aiding and abetting the heroin possession of the other three defendants. All convictions of Scott and Onick are reversed.

[11] The remaining three defendants lack standing to challenge the legality of the arrests of Scott and Onick, which took place before the other three were arrested. Since they have no standing to challenge the admissibility of evidence seized in the initial arrests, it follows that even if the evidence was illegally seized from the first two suspects, it was proper for the police to use that evidence in determining whether there was probable cause for the subsequent arrest of the other three suspects. [12] Probable cause for an arrest exists when the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant in a person of reasonable caution the belief that an offense has been or is being committed. [13] In this case, several years of investigation had already established one defendant's high profile in the illegal drug business. The

officers could reasonably have believed that a narcotics transaction had or was about to take place, and probable cause existed for the three defendant's arrest.

OPINION

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Alvin Tolliver, Jose Antonio Perrett, Amalio Galvan-Venegas, Willie Ernest Scott, and Angela Faye Onick were tried and convicted of conspiracy to possess heroin with intent to distribute it in violation of 21 U.S.C. § 841(a)(1), and of possession with intent to distribute heroin and aiding and abetting in violation of 21 U.S.C. § 841(a)(1) and 18 U.S.C. § 2. All defendants appeal, challenging the prosecution's use of peremptory challenges during voir dire to strike minorities from the jury panel, and the admission at trial of evidence that they assert was seized during arrests unsupported by probable cause.

I

The investigation began in early 1981, when DEA Agent Tom Waddill first became aware of defendant Alvin Tolliver during an undercover drug buy at which Tolliver was present. The next year, Waddill learned that Tolliver was managing the Double Feature club in Fort Worth, Texas, whose building was owned by Donnie Harper, a known drug dealer. Informants told Waddill that Tolliver was one of Harper's lieutenants, and that he was dealing large amounts of heroin and cocaine in Fort Worth.

Waddill learned from the FBI that Harper was depositing large amounts of cash in a local bank, and that

he had a "Page-A-Fone" beeper, number 5047. Through a subpoena, Waddill obtained the records of beeper number 5047 from Page-A-Fone, and found numerous messages from beeper number 5107. According to the records, that beeper belonged to Alvin Tolliver, who was receiving up to forty-five messages a night, mostly from people in the drug trade.

The message slips included several from "Juan"; the callback number on one of those slips was to Room 119 at the Caravan Motel in Fort Worth, which was registered at the time to defendant Jose Antonio Perrett. Perrett had been arrested with several others in May, 1980 for possession of approximately nine ounces of Mexican heroin. Later messages left by "Juan" with callbacks to the Caravan were to rooms registered in the name of defendant Amalio Galvan.

In January 1983, after learning that "Juan" had called Toliver, Waddill and Fort Worth police set up surveillance at the Caravan Motel and observed Tolliver and Galvan arrive in separate cars and enter a room at the motel. Tolliver left the room shortly thereafter and drove away, but no apparent illegal activity was observed.

On September 12, 1983, Agent Waddill learned that Tolliver had received another beeper message from "Juan," with a callback to Room 109 at the Caravan Motel. Waddill called the motel management, learned that Room 109 was registered to two people in the name of Amalio Galvan, and obtained the license plate number of the car listed on the motel registration card. Waddill requested that Fort Worth police officer Michael DeLaFlor accompany him in a separate car to the Caravan. While driving to the motel, Waddill learned that the car

registered to Galvan belonged to Maricela Barrera de Perrett, the wife of Jose Antonio Perrett.

When Waddill arrived at the Caravan, he requested and received a room with a clear view of Room 109. He established surveillance with three Fort Worth police officers. They observed Galvan leave Room 109 and drive away alone in a Chevrolet Caprice. Shortly thereafter, Alvin Tolliver, who was carrying a bulging leather camera bag over his shoulder, walked across the motel parking lot and entered Room 109.

Defendant Angela Faye Onick then arrived in a Mercury automobile and backed into a parking spot in front of Room 109. The officers saw defendant Willie Ernest Scott, walking the same path that Tolliver had taken earlier, get in the back seat of the car. A check on Onick's vehicle revealed that it was registered to Barbara Carr, Tolliver's common law wife.

Within minutes, Tolliver left Room 109 carrying the leather camera bag, which he threw in the back seat of the Mercury. After a brief conversation with Tolliver, Onick left the car, walked with Tolliver to the restaurant area of the motel, and then returned to the car with him, getting into the driver's seat. Scott got out of the back seat, spoke briefly to Tolliver, and sat in the front passenger seat. As Onick drove out of the motel parking area, Tolliver returned to Room 109.

Believing a drug transaction had taken place, Waddill and other officers followed Onick's car to a drugstore parking lot a quarter mile from the motel. As Scott and Onick were getting out of the car, Waddill and the officers aproached and identified themselves. Waddill retrieved the brown leather bag from the back seat of the

Mercury, expecting to find narcotics; the bag, however, was empty. Seeing a small bulging change purse resting on the console between the two front bucket seats of the car, Waddill inspected it; he discovered $849 in cash and a small plastic baggie of white powder sealed with a rubber band. Waddill then instructed one of the Fort Worth officers to conduct an inventory search of the automobile. The officer opened the driver's door and discovered, at the crack on the driver's seat where the backrest and lower seat met, both a small clear gelatin capsule containing a white powder and a wadded, cellophane-wrapped ball of brown paper containing a dark gummy substance. These items were given to Waddill, Onick and Scott were arrested, and the Mercury was secured and left in the parking lot.

Waddill took the seized items to Room 126 of the Caravan, where they were field tested. The white powder in both the bag and the capsule tested positive for cocaine, and the dark gummy substance tested positive for heroin.

Galvan was then observed returning to the Caravan in the Chevrolet Caprice and entering Room 109. Within a few minutes, Galvan, Tolliver and Perrett left Room 109 and got in the Chevrolet. Waddill and the officers approached the car with guns drawn, identified themselves, and asked all three men to get out of the vehicle. As the officers approached the men to pat them down for weapons, Tolliver made a quick move, reaching down to the inside of his left ankle. Suspecting that he had a weapon concealed in an ankle holster, two officers grabbed him, held him on the hood of the automobile, handcuffed him, and inspected the area he was reaching for. Tolliver was wearing two socks on his left foot; between them at his ankle was a substance wrapped in

plastic, brown paper, and tape. Officer DeLaFlor removed part of the wrapping, revealing a dark gummy substance. Galvan and Perrett were both patted down; $19,000 in cash was found in Galvan's boots, and $19,770 was found in the boots and pockets of Perrett. All three men were arrested.

Laboratory tests established that both the substance in the package seized from Tolliver and the dark gummy substance found in Scott and Onick's vehicle were heroin with a purity of about 65%. The net weight of the heroin discovered on Tolliver was 123.6 grams, or approximately 4.4 ounces. Evidence at trial established that the wholesale value of 65% pure heroin was approximately $10,000 an ounce, making the heroin seized from Tolliver worth at least $40,000; the evidence also showed that the heroin could be cut to 3% or 4% purity, and divided into units of .1 gram selling for $20 apiece, placing its potential street value in the neighborhood of $500,000.

The capsule found in the Mercury contained .121 grams of 34% pure cocaine. The white powder in the baggie found in the small change purse proved to be lactose, a non-controlled substance sometimes used to cut heroin and cocaine.

An inventory search of the trunk of the Mercury used by Scott and Onick turned up a blender, a strainer, a spoon, a battery-operated digital scale, a shaving kit with miscellaneous personal items, and a bank bag containing a loan book and a medical bill with the name "Lola Onick" on them. Chemical analysis of the blender jar showed it contained a small amount of heroin residue.

Tolliver, Perrett, Galvan, Scott and Onick were indicted on two counts. The first charged them with con-

spiracy to possess heroin with intent to distribute in violation of 21 U.S.C. § 846. The second count charged each with possession of heroin with intent to distribute, and aiding and abetting, in violation of 21 U.S.C. § 841 (a)(1) and 18 U.S.C. § 2.

The defendants questioned the legality of all the searches and filed motions to suppress all evidence seized in connection with both sets of arrests. Following a suppression hearing, the district court denied all motions to suppress, and a jury trial was held. All defendants were found guilty on both counts.

II

Defendants first contend that the government's use of peremptory challenges to strike minority members from the venire deprived them of a fair and impartial jury as guaranteed by the sixth amendment.

[1] It is undisputed that all defendants are either black or hispanic, and that of the eight peremptory challenges allowed the government, six were used to remove all black and hispanic veniremen. As a result, defendants were tried before an all-white jury. After the jury was selected, defense counsel moved to quash the panel. No evidence of routine or systematic exclusion of blacks from petit juries was presented, and the motion was denied.

[2] In *Swain v. Alabama*, 380 U.S. 202, 227 (1965), the Supreme Court held that in order to establish a valid constitutional claim of invidious racial discrimination by a prosecutor in the selection of jurors, "the defendant must show the prosecutor's systematic use of peremptory chal-

lenges against Negroes over a period of time." In *Prejean v. Blackburn*, 743 F.2d 1091, 1104 (5th Cir. 1984), *modified*, 765 F.2d 482 (5th Cir. 1985), we determined that a showing that the prosecutor had exercised his peremptory challenges to exclude all blacks from the jury panel in one case was insufficient under *Swain* to raise a constitutional issue. We held that there must be "a particularized showing that the prosecution has engaged in the systematic, invidious use of peremptory challenges." *Id.*, 743 F.2d at 1104. Defendants in this case made no showing of systematic exclusion of minorities from juries over a period of time. The issue is now before the Supreme Court, *Batson v. Kentucky, cert. granted*, 105 S. Ct. 2111 (1985) (No. 84-6263), but under the current law of this circuit the motion to quash the jury was properly denied.

III

[3] Defendants Onick and Scott argue that their arrests in the drugstore parking lot were unsupported by probable cause, and that the district court erred in denying their motion to suppress all evidence seized in connection with that arrest. Because we find that there was insufficient evidence at trial to sustain their convictions on either count of the indictment, we do not reach the issue of whether there was probable cause for their arrests.

On appeal, the standard of review of the sufficiency of the evidence in a criminal case is whether a "reasonable trier of fact could [have found] that the evidence establishe[d] guilt beyond a reasonable doubt." *United States v. Bell*, 678 F.2d 547, 549 (5th Cir. 1982) (en banc),

aff'd, 103 S. Ct. 2398 (1983). In evaluating a claim of insufficient evidence according to this standard, we view the evidence in the light most favorable to the government. *Glasser v. United States*, 315 U.S. 60, 80 (1942).

While the government joined issue at oral argument with both Onick and Scott as to the sufficiency of the evidence to support their convictions, the record is uncertain regarding Onick's assertion of the point to the trial court. At times during trial, each defendant adopted the objections and motions of the others, but we are unsure which defendants raised the sufficiency point. Regardless, we are persuaded that Scott preserved the point at each turn; while Onick may not have done so, it would on this record be a manifest miscarriage of justice not to give similar treatment to the identically situated defendants. *See United States v. Dominguez*, 615 F.2d 1093, 1097 (5th Cir. 1980).

A

[4] Defendants Scott and Onick were charged in the first count of the indictment with conspiracy to possess heroin with intent to distribute. In a conspiracy prosecution under 21 U.S.C. § 846, the government must prove beyond a reasonable doubt both the existence of an agreement between two or more persons to violate the narcotics laws, and that such conspirator knew of, intended to join, and participated in the conspiracy. *United States v. Michelena-Orovio*, 719 F.2d 738, 742 (5th Cir. 1983) (en banc), *cert. denied*, 104 S. Ct. 1605 (1984); *United States v. Vergara*, 687 F.2d 57, 60-61 (5th Cir. 1982). No showing of an overt act is necessary in a drug conspiracy prosecution, and the "agreement between the co-

conspirators and defendant need not be proved by direct evidence, but may be inferred from concert of action." *Vergara,* 687 F.2d at 61. Of course, presence at the scene of the crime or close association with a co-conspirator alone will not support an inference of participation in a conspiracy. *Vergara,* 687 F.2d at 61.

[5] Viewing the record in the light most favorable to the government, we find the evidence insufficient to support a conspiracy charge against either Scott or Onick for possession of heroin with intent to distribute. As is typical in this kind of case, there was no direct evidence that either of these two defendants were part of any agreement to violate the narcotics laws, and the government had to rely exclusively on circumstantial evidence. Most of this circumstantial evidence did no more than place Scott and Onick at the motel, where they briefly assosciated with the other defendants. As a whole, the evidence was insufficient to prove beyond a reasonable doubt that they were part of the charged conspiracy.

The government argues that among Tolliver's "Page-A-Fone" records were several messages from a "Willie," and that these support an inference of conspiracy at least as to Willie Ernest Scott. However, the evidence at trial indicated that at least two other members of the "drug community" were known as "Willie" and that no attempt was made to link the telephone numbers on the messages to any number accessible to Scott.

The government's strongest evidence of a conspiracy between Scott or Onick and the other defendants was the small sample of heroin, with the same purity as that of the heroin seized in the arrest of the three other defendants, which was found on the driver's seat of the vehicle

they were traveling in. However, neither Scott nor Onick had the heroin on their person or in any container or purse shown to have been owned by either of them, nor was either ever proved to have touched or handled it at any time. No evidence established how the heroin sample got in the Mercury or how long it had been there. The vehicle in which it was found was not registered to either Scott or Onick, but to Tolliver's wife. No evidence directly indicated that either defendant was aware of the heroin's presence: there was no furtive attempt to hide or destroy it on seeing the approach of the officers, and it was found in an inconspicuous location at the crack between the backrest and seat cushion where neither defendant would have been likely to notice it during a short trip. Significantly, the relation of these small quantities to the activities of Tolliver, Perrett, and Galvan-Venegas is left to surmise.

As to the items found in the trunk of the vehicle during the inventory search conducted after it was impounded, we find similar difficulties in viewing them as providing the conspiratorial link between Scott and Onick and the others. The only item connected on its face to either was the bank bag containing a payment book and a medical bill belonging to a "Lola Onick." The last entry in the payment book was in December 1982, nine months prior to the arrest. The shaving kit, on the other hand, clearly was Tolliver's, and contained items of jewelry belonging to him. No evidence established that Scott or Onick had access to the trunk or the items in it, and nothing indicated how recently the payment book and medical bill belonging to someone with Onick's last name had been placed there. No connection was proved between the other items in the trunk and either Scott or Onick.

[6] In the absence of additional evidence providing a link between the other defendants' illegal activities and Scott and Onick, we are persuaded that a reasonable jury would have entertained a reasonable doubt as to whether Scott and Onick conspired to possess and distribute heroin as charged in the first count.

B

The second count of the indictment charged Scott and Onick with both possession of a controlled substance with intent to distribute it, in violation of 21 U.S.C. § 841 (a)(1), and aiding and abetting in violation of 18 U.S.C. § 2.

[7] Three elements must be proven to sustain a conviction for possession of heroin with intent to distribute: "(1) knowing (2) possession of heroin (3) with intent to distribute it." *United States v. Richards,* 638 F.2d 765, 768 (5th Cir.), *cert. denied,* 454 U.S. 1097 (1981). The possession may be actual or constructive, may be joint among several defendants, and may be proved by either direct or circumstantial evidence. Constructive possession is defined as " 'the knowing exercise of, or the knowing power or right to exercise dominion and control over the proscribed substance,' " *United States v. Glasgow,* 658 F.2d 1036, 1043 (5th Cir. 1981) (quoting *United States v. Marx,* 635 F.2d 436, 440 (5th Cir. 1981)), and may be established by "dominion or control over the premises or the vehicle in which the contraband was concealed," *United States v. Moreno,* 649 F.2d 309, 312 (5th Cir. 1981) (quoting *United States v. Martinez,* 588 F.2d 495, 498 (5th Cir. 1979)). However, "mere presence in the area where the narcotic is discovered or mere association with the person who does control the drug or the property where it is located, is insufficient to support a finding

of possession." *United States v. Moreno,* 649 F.2d 309, 312 (5th Cir. 1981) (quoting *United States v. Stephenson,* 474 F.2d 1353, 1355 (5th Cir. 1973)).

[8] The charge of aiding and abetting possession of heroin with intent to distribute required proof of "(1) aiding and abetting the possession and (2) aiding and abetting the intent to distribute." *United States v. Aguirre Aguirre,* 716 F.2d 293, 298 (5th Cir. 1983). "To aid and abet, the defendant must wilfully associate himself in some way with the criminal venture and wilfully participate in it as he would in something he wished to bring about." *Id.*

[9] The government argues that both the contraband found in the vehicle and the heroin found on the person of Tolliver provide a basis for Scott and Onick's convictions for possession with intent to distribute. The government's theory for charging Scott and Onick with possession of the heroin held by the other three defendants is apparently an application of the *Pinkerton* principle: "that a party to a continuing conspiracy may be responsible for a substantive offense committed by a coconspirator in furtherance of the conspiracy, even though that party does not participate in the substantive offense or have any knowledge of it." *United States v. Michel,* 588 F.2d 986, 999 (5th Cir. (citing *Pinkerton v. United States,* 328 U.S. 640 (1946)), *cert. denied,* 444 U.S. 825 (1979). Because we have determined that the conspiracy count against both Scott and Onick must fail, the *Pinkerton* principle cannot apply to find them guilty of a substantive offense based upon the heroin found on the person of Tolliver.

[10] A similar conclusion must be reached as to the charge against defendants Scott and Onick for aiding

and abetting the heroin possession of the other three defendants. As discussed above, the government has shown little more than presence and association, which is insufficient to sustain a conviction for possession with intent to distribute, even on an aiding and abetting theory. *See United States v. Acosta,* 763 F.2d 671, 682 (5th Cir.), *cert. denied sub nom. Weempe v. United States,* 106 S. Ct. 179 (1985).

As to the narcotics found in the vehicle occupied by Scott and Onick, we have concerns similar to those we discussed in connection with the alleged conspiracy--that is, the paucity of evidence indicating awareness by either Scott or Onick of the contraband's presence in a vehicle they did not own and were not shown to have controlled for more than a brief period. Moreover, although defense counsel elicited on cross examination the gross weight of the entire package of heroin seized from the vehicle, our review of the record indicates that the government did not put on any proof as to its net weight. Absent such proof, the jury could not presume that the amount of heroin in the package was sufficiently large to support an inference of intent to distribute. Had the government proceeded against Scott and Onick on a simple possession charge, it might have succeeded without proving the net weight of the seized heroin. However, the evidence was insufficient to establish possession with intent to distribute.

We therefore must reverse the convictions of Scott and Onick on all counts.

IV

The remaining defendants, Tolliver, Perrett and Galvan-Venegas, each assert that neither the arrest of Onick

and Scott nor their own arrests were supported by probable cause, and that all evidence seized during either arrest should have been suppressed.

[11] We first address the question of Tolliver, Perrett and Galvan's standing to challenge the legality of the arrests of Scott and Onick. The blunt answer is that they have none. The fourth amendment confers personal rights that may not be vicariously asserted: "since the exclusionary rule is an attempt to effectuate the guarantees of the Fourth Amendment . . . it is proper to permit only defendants whose Fourth Amendment rights have been violated to benefit from the rule's protections." *Rakas v. Illinois,* 439 U.S. 128, 133-34 (1978) (citation omitted). Since these defendants had no standing to challange the admissibility at trial of evidence seized in the initial arrests of Scott and Onick, *see Wong Sun v. United States,* 317 U.S. 471, 491-92 (1962), it follows *a fortiori* that even if the evidence was illegally seized from the first two suspects, it was proper for the police to use that evidence in determining whether there was probable cause for the subsequent arrest of the other three suspects.

[12] Probable cause for an arrest exists when "the facts and circumstances within the knowledge of the arresting officer and of which he has reasonably trustworthy information are sufficient in themselves to warrant in a person of reasonable caution the belief that an offense has been or is being committed." *United States v. Woolery,* 670 F.2d 513, 515 (5th Cir.), *cert. denied,* 103 S. Ct. 78 (1982). Far less evidence is necessary to establish probable cause than to support a conviction. *United States v. Ashcroft,* 607 F.2d 1167, 1170 (5th Cir. 1979), *cert. denied,* 446 U.S. 966 (1980). In deter-

mining probable cause "we must take into account the experience of the agents," since " '[c]onduct innocent in the eyes of the untrained may carry entirely different messages to the experienced or trained observer.' " *Woolery*, 670 F.2d at 515 (quoting *United States v. Clark*, 559 F.2d 420, 424 (5th Cir.), *cert. denied*, 434 U.S. 969 (1977)).

[13] In this case, several years of investigation had already established Tolliver's high profile in the illegal drug business in Fort Worth. Perrett had a previous arrest record for possession of heroin. Tolliver, Perrett, and Galvan were linked through Tolliver's Page-A-Fone records, and Tolliver and Galvan had been observed meeting at the Caravan Motel on a prior occasion. On the day of the arrest, Tolliver was seen entering Room 109 of the motel with a bulging leather bag, which was found to be empty during Scott and Onick's arrest, leading to a reasonable suspicion that drugs or money it may have contained were still in Tolliver's possession or had been given to the remaining two suspects. The Mercury driven by Scott and Onick was registered to Barbara Carr, Tolliver's common law wife, and in it were found three items of contraband that field-tested positive for heroin or cocaine. Agent Waddill and the other officers could reasonably have believed that a narcotics transaction had or was about to take place, and probable cause existed for the three defendants' arrest. The district court did not err in denying defendants' motion to suppress the evidence seized during their arrests. The convictions of Tolliver, Perrett, and Galvan-Venegas are therefore affirmed.

AFFIRMED IN PART; REVERSED IN PART.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 85-1183

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

ALVIN TOLLIVER, JOSE ANTONIO PERRETT, AMALIO GALVAN-VENEGAS, WILLIE ERNEST SCOTT and ANGELA FAYE ONICK,
Defendants-Appellants.

Appeal from the United States District Court
for the Northern District of Texas

ON PETITION FOR REHEARING

(March 11, 1986)

Before REAVLEY, WILLIAMS, and HIGGINBOTHAM, Circuit Judges.

PER CURIAM:*

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* Local Rule 47.5 provides: "The publication of opinions that have no precedential value and merely decide particular cases on the basis of well-settled principles of law imposes needless expense on the public and burdens on the legal profession." Pursuant to that Rule, the court has determined that this opinion should not be published.

In their collective petitions for rehearing, Tolliver, Perrett and Galvan raise numerous issues. We specifically address only the admission against petitioner Galvan of evidence obtained in the warrantless search of the motel room registered in his name.

Galvan argues that the warrantless search of the motel room following his arrest was illegal; he also argues that over his objection at trial, Agent Waddill described the room, noting in particular the absence of property associated with routine travelers and guests. Galvan argues that the admission of this evidence was prejudicial; that the government referred to the condition of the motel room "several times" in its closing argument; and that he raised the issue of the illegal search in his pretrial motion to suppress, by timely objection at trial, by point of error in his brief on appeal, and in oral argument. He therefore asks us to reverse his conviction.

Galvan's contention throughout trial was that his arrest was unsupported by probable cause or reasonable suspicion, and that any evidence seized by police thereafter was tainted. It was never contended that absent such taint, evidence obtained from a cursory inspection of the motel room was also inadmissible because police did not obtain a warrant before entering. In his pretrial motion to suppress, for example, Galvan requested the suppression of a number of items seized "as a result of a search of Room 109, the vehicle bearing Texas license number VNN 323, and the person of the Defendant incident to his arrest. . . ." His memorandum in support of the motion to suppress does not mention the search of the motel room at all, and it makes clear that the motion was based entirely on the theory that since his arrest was unsupported by probable cause or reasonable

suspicion, any evidence seized thereafter was tainted by the illegality of the arrest. Similarly, Galvan's objection at trial did not refer to the warrantless nature of the search of the motel room; rather, counsel stated, "I would have to object to any description of the room, what was in room 109, *on the basis of the motions that we've already filed in the Court,* and I would like to point that out to the Court at this time." (Emphasis added.)

We find that Galvan's objection at trial did not adequately inform the trial judge that it was founded on the warrantless character of the search. Counsel objected "on the basis of the motions that we've already filed in the Court," and nowhere earlier had Galvan raised the issue of the warrantless search. Because Galvan urges on appeal that his objection should have been sustained on grounds not raised in the trial court, the plain error standard applies. *See United States v. Montemayor,* 684 F.2d 1118, 1121 (5th Cir. 1982). Plain error, which is error "so obvious that failure to notice it would 'seriously affect the fairness, integrity, or public reputation of judicial proceedings.' " *United States v. Todd,* 735 F.2d 146, 149 (5th Cir. 1984), *cert. denied,* 105 S. Ct. 957 (1985) (quoting *United States v. Brown,* 634 F.2d 819, 829 (5th Cir. 1981)), was not present here.

While there is no hard and fast rule for determining plain error, *United States v. Gerald,* 624 F.2d 1291, 1299 (5th Cir. 1980), *cert. denied,* 450 U.S. 920 (1981), three factors inform our decision. First, the error was certainly not "obvious"; as far as we can discern from our own examination of the record, the court was never informed that the search of the motel room was warrantless. *See United States v. Perez,* 651 F.2d 268, 273 (5th Cir. 1981) (appellate notice of plain error is limited

to those "so rank that they should have been apparent to the trial judge without objection. . . ."). Second, the use made of the admitted evidence was limited, and played no critical role in the government's theory of the case. Indeed, the government's references to the condition of the motel room in closing argument were at most oblique. The government argued that when everyone "was going to go their way[, t]hey didn't have bag one," which may have referred only to the fact that there was no luggage in the appellants' automobile, a fact established in a lawful inventory search of the car after the arrest. The only other reference was made when the government referred to the shaving kit found during the inventory search of the Mercury: "There's the only shaving kit that was out there at the motel. You've got . . . five people staying in a motel, and that's the only shaving kit, except there isn't any shaving material in it." Finally, the question of Galvan's guilt was not a close one; when arrested, he and Perrett were found to have nearly $40,000 in cash stuffed in their boots and pockets, while Tolliver was found to have a quantity of heroin strapped to his ankle with a whole-sale value of approximately the same amount, and a street value of nearly a half million dollars. The jury did not need the evidence of the condition of the motel room to reject as incredible Galvan's story that the cash was intended to purchase used automobiles, and was in his boots for safekeeping.

That these able lawyers did not base their objection to the admission of this evidence on the warrantless search of the motel room is understandable. In *Mincey v. Arizona*, 437 U.S. 385, 394 (1977), the Supreme Court indicated that a residence may be searched in connection

with an arrest where there are exigent circumstances, which include the possibility that "evidence would be lost, destroyed or removed during the time required to obtain a search warrant." We have held that "[a]rresting officers have a right to conduct a quick and cursory check of the arrestee's lodging immediately subsequent to arrest . . . where they have reasonable grounds [or reasonable suspicion] to believe that there are other persons present inside who might present a security risk." *United States v. Sheikh*, 654 F.2d 1057, 1071 (5th Cir. 1981), *cert. denied*, 455 U.S. 991 (1982); *see also United States v. Bowdach*, 561 F.2d 1160 (5th Cir. 1977); *United States v. Irizarry*, 673 F.2d 554 (1st Cir. 1982); *United States v. Agapito*, 620 F.2d 324, 335-36 (2nd Cir.), *cert. denied*, 449 U.S. 834 (1980).

Had the warrantless search issue been presented, and the record developed on this point, the doctrine of exigent circumstances may have justified a warrantless "security check" of the motel room in order to ensure the safety of the arresting officers and to prevent the destruction of evidence. The record as it stands indicates that the police had no way of knowing that there were no additional persons in the motel room when the three appellants were arrested; the police may also have suspected that armed confederates were watching the arrest from the motel room, or that confederates might attempt to dispose of heroin or other evidence remaining in the room.

Determining whether exigent circumstances justified a warrantless search on this record, however, is problematic in light of *United States v. Kolodziej*, 706 F.2d 590 (5th Cir. 1983), in which a panel of this court interpreted the reference to "reasonable grounds" in *Sheikh* as re-

quiring "*probable cause* to believe that a serious threat to safety is presented." *Kolodziej*, 706 F.2d at 597 (emphasis added) (quoting *United States v. Cravero*, 545 F.2d 406, 418 (5th Cir. 1976), *cert. denied*, 430 U.S. 983 (1977)). Because the warrantless search issue was never raised, the record is not sufficiently well-developed to determine whether such probable cause actually existed. Consequently, we do not rest on the doctrine of exigent circumstances, but instead on our determination that the admission of evidence was not plain error.

No other issues raised by appellants merit discussion, and the petitions for rehearing are DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Federal Rules of Appellate Procedure and Local Rule 35) the Suggestions of Tolliver and Galvan for Rehearing En Banc are DENIED.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

NO. 85-1183

D.C. Docket No. CR-4-83-155-K

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ALVIN TOLLIVER, JOSE ANTONIO PERRETT, AMALIO GALVAN-VENEGAS, WILLIE ERNEST SCOTT and ANGELA FAYE ONICK
Defendants-Appellants.

(Filed February 10, 1986)

Appeals from the United States District Court for the Northern District of Texas

Before REAVLEY, WILLIAMS and HIGGINBOTHAM, Circuit Judges.

JUDGMENT

This cause came on to be heard on the record on appeal and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgments of conviction of the District Court of appellants Alvin Tolliver, Jose Antonio Perrett and Amalio Galvan-Venegas are affirmed; and the judgments of conviction of

appellants Willie Ernest Scott and Angela Faye Onick are reversed, and the cause is remanded to the District Court for further proceedings in accordance with the opinion of this Court.

January 16, 1986

ISSUED AS MANDATE: FEB. 7, 1986.
AS TO SCOTT & ONICK ONLY

APPENDIX D

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* * *

THE COURT: Yes.

MR. EVANS: No, sir.

THE COURT: All right. Be here at 10:00. You all got something you want to talk about?

MR. WASHINGTON: Your Honor, I wanted to state for the record an objection. The court didn't inquire to the composition of the jury after they were seated. Not as to the manner in which the clerk of the Court duly noted and properly noted the peremptory challenges as used by counsel for the government and counsel for the defendant, but I would like to object to the manner in which the government has used its peremptory challenges now so as to not have the matter waived, and say that we will present a motion in writing. We noticed that of the eight challenges awarded to the government by the Court, they exercised those against all the minorities, being one Hispanic and five blacks that were on the panel. I'm sure there's some good salient reason, which we will take up at the appropriate time with counsel under oath on the question of determining that. But as I understand the 2nd Circuit case that came down, we must first object to it at this time and then at the appropriate time when the Court will allow us leave to do so, take it up by written motion. But generally, we object that he has used his peremptory challenges in a manner that discriminates against minority persons. And as the Court can see, all the defendants are minorities, either black or Hispanic origin.

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THE COURT: You've got your objection. You've preserved it. Do you want to make one about being here while Legislature is in session? I don't know whether it's good in federal court, but you can take a crack at it.

MR. WASHINGTON: I don't know. I'd rather be here than there. They might vote on a tax bill or something. I'd rather stay with you two weeks, Judge. I get better treatment here than I do there anyway.

THE COURT: I wish I had you riding that bus with me. Get that thing up formally. Anything else now?

MR. WUESTER: Yes, Judge. There were some other motions filed. Has the Court ruled on those? And, if so, what is the ruling for the record?

THE COURT: Well, I was going to get it in writing. The order I saw didn't have all of your motions. There was a motion for severance and a motion for Grand Jury, the testimony before the Grand Jury.

MR. ROLFE: I believe we complied with the—

THE COURT: His order said all motions, I think. We didn't list them specifically, but they are all overruled.

MR. BIRES: Your Honor,—

THE COURT: I believe you ought to broaden that thing. If you will write another order and include Bill's.

MR. ROLFE: The severance?

THE COURT: This is really just suppression.

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* * *

of this will certainly be reconsidered.

And you all may go, if you want to. But I just wanted to explain that to you.

MR. WASHINGTON: Your Honor, before we go, if the Court was finished with that, that there was one administrative matter I needed to get. May I address the Court at the lectern?

The Court will recall that after the conclusion of the voir dire examination and jury selection you gave us leave to interpose an objection which was adopted by all the defendants. I'm not certain as to the state of the record. In order that the record may be clear before this case goes up on appeal, there is a substantial question that I would like to have presented on behalf of Mr. Tolliver, and I think the other lawyers on behalf of their clients, with respect to the manner in which the jury was selected.

The Court will recall that you gave me leave at that time to perfect that objection at a later time. In order that the record may be made whole now, Mr. Rolfe and I had earlier agreed to a stipulation.

First, I would like to introduce the testimony as a part of that motion, and this matter could be considered nunc pro tunc that the objection was made at the conclusion of the voir dire examination and the seating of jury panel and before testimony began. Defendants, I recall, all gave notice to the Court at that time that we objected to the manner in which the government

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exercised its peremptory challenge.

THE COURT: The systemized challenge of minorities?

MR. WASHINGTON: Yes.

THE COURT: Okay. I thought you gave me a motion and order on that, written?

MR. WASHINGTON: Yes, sir. But I don't think the evidence was adduced which would be necessary for the appeal.

THE COURT: All right.

MR. WASHINGTON: I think it may be agreed and stipulated between counsel for the United States Government and counsel for the defendants that the following stipulation is agreed to and may be a part of the record nunc pro tunc as if made at the conclusion of the voir dire examination of the jury and before testimony began:

That Gloria N. Ramon, R A M O N, was a Hispanic female who had a brother who was a Border Patrolman in Laredo. And all the testimony adduced on the examination of that witness may be made a part of the record for the purpose of excepting to the manner in which the government exercised its challenges. She was venire person number two.

That venire person number 7, Ella S. Harden, was a black female who had a sister who was a deputy sheriff with the Tarrant County Sheriff's Department who had been so employed for 15 years and worked in the jail division, and that all of her testimony as adduced and examination and voir dire of her would

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be introduced as a part of our objection.

That Reda, R E D A, M. Jackson, number 10, was a black female who knew the defendant Tolliver, who also

knew of counsel Sturns, who had been a juror in an aiding and abetting drug case and had reached a verdict in the federal court here during that period of time, during the term of Court for which the venire persons were called.

That number 18, venire person number 18, James Willie Walter, was a black male who had an uncle who was a private detective, who had served on a jury in 1975 in Tarrant County in a murder case, and that jury was able to reach a verdict.

That venire person 31, David M. Hasson, was a black male who lived in Fort Worth.

And that venire person 36, Robert L. Cooper, was a black male who lived in Fort Worth and who knew the defendant Scott.

That all of the persons before mentioned by name, that the first of the testimony of all of those witnesses as adduced at the voir dire examination be made a part of the motion nunc pro tunc, and that it be agreed and stipulated by counsel for the government and counsel for all the defendants that those persons aforementioned were stricken by the United States Government, their peremptory challenges were exercised against those individuals, and that they were excluded from jury service in this case by the United States Government.

THE COURT: All right. Is that stipulated?

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MR. ROLFE: Judge, I haven't checked all exactly who was striken, but I will stipulate to the fact that what he said about their being Mexican-American or black is correct, and I think the record will reflect which persons we challanged.

THE COURT: Well, what we have got to do, as I recall, there weren't any minorities on the jury, on the actual 12 jurors. Were there?

MR. ROLFE: Not in the sense of the word minorities as used popularly.

THE COURT: I'm talking about no Mexican-Americans or blacks amongst the 12 deciding the case.

MR. ROLFE: I don't believe so, Your Honor.

THE COURT: It might be best if you wrote that up and both of you signed it, and it will be entered nunc pro tunc.

MR. WASHINGTON: Yes, sir.

THE COURT: And then when you order the record, ask Joe to specifically transcribe that portion of the jury selection or he doesn't generally do that. You will have to—you better call it to his attention.

MR. WASHINGTON: Yes, sir. May we introduce the government's strike list, which I believe will be sufficient to corroborate the fact that those named individuals were—

THE COURT: Have you got it, Jeane?

THE CLERK: It's part of the record.

MR. WASHINGTON: It will be part of the record, but as

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part of the motion, may we introduce it as joint exhibit number 1.

THE COURT: That will be fine. Anything you need.

MR. WASHINGTON: Thank you, Your Honor.

THE COURT: Now, I thank you all—I forget these things. You probably better talk to—do you want to talk to these defendants before they leave, that you will be on—you will still be under the supervision of the Probation Department. You will be able to go about your business and nothing is going to happen to you as long as you behave until this case is decided in New Orleans. As I say, it could be at least six months to a year before it is ever decided. And during that period of time, you go about your business. But just don't get in trouble because if you get in trouble they're going to ask that we revoke your probation, and then you will have to go to jail. So it is just that simple. He will tell you, it will be the same rules and regulations that they have already told you. Okay. Where is—all right. We'll just stand in recess till he gets through.

MR. EVANS: Your Honor, for the record, I want to adopt—

THE COURT: All of you can adopt Senator Washington's motion for the benefit of all of you.

MR. EVANS: Thank you, Your Honor.

THE COURT: Now, I am going to be gone, but if you

* * *